

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ANGELA UNDERWOOD, Personal  
Representative for the Estate of Tyler  
Underwood

Plaintiff,

vs.

O'REILLY AUTO PARTS, INC., *et al.*,  
  
Defendant.

Case No.: 2:21-cv-01766-GMN-NJK

**ORDER**

Pending before the Court is Defendant Tower Energy Group LLC's ("Defendant's") Motion to Dismiss and Motion for More Definite Statement, (ECF No. 258). Plaintiff Angela Underwood<sup>1</sup> ("Plaintiff") filed a Response, (ECF No. 265), to which Defendant did not file a Reply.

For the reasons discussed below, the Court **DENIES** Defendant's Motion for More Definite Statement and **GRANTS** Defendant's Motion to Dismiss.

**I. BACKGROUND**

This case arises from Tyler Underwood's alleged personal injuries caused by his exposure to benzene contained in products sold by O'Reilly Auto Parts, Inc., Illinois Tool Works, Inc., The Blaster Corporation, CRC Industries, Inc., Safety-Kleen, Highland Stores, Inc., Bi-Rite Markets, Inc., 7-Eleven, Inc., Richard A. Haley, Autozone Stores, LLC, Amrep,

---

<sup>1</sup> On March 10, 2022, an Emergency Joint Motion for Extension of Discovery Deadlines was filed stating that the original plaintiff, Tyler Underwood, died during the pendency of this action. (J. Mot. Extension Disc. Deadlines 9:4–10, ECF No. 112). Tyler Underwood's counsel subsequently filed a Motion to Substitute Angela Underwood, Tyler Underwood's mother, as the plaintiff in this case. (*See generally* Mot. Substitute, ECF No. 116). The Court later granted Tyler Underwood's Motion to Substitute Party. (ECF No. 138). Accordingly, Angela Underwood is now the plaintiff in this lawsuit.

1 Inc., Advance Stores Company, Incorporation, Ashland, LLC, Calumet Branded Products,  
2 LLC, Sunnyside Corporation, W.M. Barr & Company, Technical Chemical Company, RM  
3 Markets, Inc., Omni Industries LLC, Omni Specialty Packaging, Amalie Oil Company, Citgo  
4 Petroleum Corporation, and Tower Energy Group in the State of Nevada (“Defendants”). (Am.  
5 Compl. ¶¶ 6, 20–21, ECF No. 184). From 2006 to 2020, Tyler Underwood repaired, restored,  
6 and maintained vehicles and equipment in Nevada and Arizona. (*Id.* ¶¶ 11–18). Plaintiff  
7 alleges that while working, Tyler Underwood was exposed to benzene from products  
8 manufactured, marketed, supplied, distributed, and sold by Defendants. (*Id.* ¶ 20–21). As a  
9 result of his exposure to benzene, Plaintiff alleges that Tyler Underwood developed a myriad of  
10 health complications, including Acute Myelogenous Leukemia, multiple related blood and bone  
11 marrow effects, cellular abnormalities, anemia, genotoxic effects, and DNA damage which  
12 ultimately resulted in his death. (*Id.* ¶ 22–23).

13 As relevant here, Plaintiff alleges that Defendant is liable for placing its allegedly  
14 defective gasoline and diesel fuel in the “stream of commerce.” (*Id.* ¶ 24(u)). Plaintiff posits  
15 that all Defendants, including Defendant, “failed to warn consumers,” including Plaintiff, “of  
16 the dangers associated with occupational exposure to benzene.” (*Id.* ¶ 25). Plaintiff avers that  
17 the benzene contained in Defendants’ products “[are] unnecessary for the proper functioning of  
18 the product, and therefore, could “have been eliminated or substantially reduced.” (*Id.* ¶ 33).  
19 Plaintiff further posits that Defendants made “material misrepresentations, and/or omitted  
20 material information, relating to the benzene content and health hazards of [its] products.” (*Id.* ¶  
21 39). As a result of these defects, as well as the material misrepresentations and omissions,  
22 Plaintiff asserts Defendants violated the duty of care owed to all consumers and workers,  
23 including Tyler Underwood. (*Id.*).

24 Plaintiff filed the instant Amended Complaint asserting the following claims: (1)  
25 negligence; (2) gross negligence; (3) strict liability; (4) breach of the express and implied

warranties; and (5) *res ipsa loquitor*. (*Id.* ¶¶ 35–65). Defendant subsequently filed the present combined Motion to Dismiss and Motion for More Definite Statement, (ECF No. 265), which the Court discusses below.

## **II. LEGAL STANDARD**

### **A. Motion For More Definite Standard, Fed. R. Civ. P. 12(e)**

“A party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). An order granting the motion is appropriate when the responding party cannot ascertain the substance of the asserted claim. *Buckley v. Cnty. of San Mateo*, No. 14-cv-05488, 2015 WL 5769616, at \*5 (N.D. Cal. Oct. 2, 2015). “Rule 12(e) motions are disfavored and rarely granted.” *Id.* (citing *Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035, 1045 (N.D. Cal. 2009)).

“Whether to grant a Rule 12(e) motion is within the discretion of the district court.” *Star Fabrics Inc. v. Norm Thompson Outfitters, LLC*, No. 19-cv-2765, 2019 WL 6894528, at \*1 (C.D. Cal. July 10, 2019). If the court grants a party’s motion for more definite statement, the court may allow leave to amend the pleading to make them consistent with the rules of pleading outlined in Fed. R. Civ. P. 8. *See Mason v. Cnty. of Orange*, 251 F.R.D. 562, 563 (C.D. Cal. 2008).

### **B. Motion to Dismiss, Fed. R. Civ. P. 12(b)(6)**

Under the Federal Rules of Civil Procedure, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The allegations “must be simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). And the complaint must “give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

///

1 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
2 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
3 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
4 which it rests, and although a court must take all factual allegations as true, legal conclusions  
5 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
6 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
7 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
8 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
9 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
10 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
11 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
12 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

13 “Generally, a district court may not consider any material beyond the pleadings in ruling  
14 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,  
15 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the  
16 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a  
17 complaint and whose authenticity no party questions, but which are not physically attached to  
18 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v.*  
19 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take  
20 judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282  
21 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion  
22 to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

23 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
24 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
25 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant

to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

### III. DISCUSSION

Defendant filed a combined Motion to Dismiss and Motion for More Definite Statement. The Court begins with the Motion for More Definite statement.

#### A. Motion for More Definite Statement

Defendant takes issue with the vague manner the Amended Complaint is pleaded because it fails to identify the specific facts particular to it that gives rise to the liability charged.<sup>2</sup> (MTD & Mot. Definite Statement 10:3–12).

Most motions for a more definite statement are based on either lack of detail or unintelligibility. “The rule is aimed at unintelligibility rather than lack of detail and is only appropriate when the defendant cannot understand the substance of the claim asserted.” *Conta v. City of Huntington Beach*, No. 8:21-cv-01897, 2022 WL 3574439, at \*3 (C.D. Cal. June 22, 2022) (citation omitted). “[A] motion for a more definite statement should not be granted unless the defendant literally cannot frame a responsive pleading.” *Id.* (citation omitted).

So-called “shotgun pleadings” may be considered unintelligible. Shotgun pleadings are generally characterized as “pleadings that overwhelm defendants with an unclear mass of allegations and make it difficult or impossible for defendants to make informed responses to the

---

<sup>2</sup> Pursuant to Local Rule IC 2-2(b), “for each type of relief requested or purpose of the document, a separate document must be filed.” Local Rule IC 2-2(b). This rule mandates that a litigant file a separate motion for each form of requested relief. Here, Defendant’s combined Motion to Dismiss and Motion for More Definite Statement requests two different types of relief, and thus, should have been filed as two separate motions. While Defendant’s violation of Local Rule IC 2-2(b) is sufficient grounds to deny the Motion, the Court will nevertheless address the Motion on the merits.

1 plaintiff's allegations." *Sollberger v. Wachovia SEC., LLC*, No. 09-cv-0766, 2010 WL  
2 2674456, at \*4 (C.D. Cal. June 30, 2010). "[P]laintiff must give the defendants a clear  
3 statement about what the defendants allegedly did wrong." *Id.* (citation omitted).

4 Plaintiff's Amended Complaint is not so unintelligible that Defendant cannot file any  
5 type of responsive pleading. While vague, Plaintiff's Amended Complaint identifies that  
6 Defendant's gasoline and diesel fuel allegedly contained benzene, that Tyler Underwood  
7 purchased these products from a 7-Eleven in Nevada, and that he developed Acute  
8 Myelogenous Leukemia as a result of his exposure. (Am. Compl. ¶ 6, 23, 24(u)). Moreover,  
9 much of the information Defendant seeks is better sought through discovery, rather than  
10 through a motion for a more definite statement. *See Beery v. Hitachi Home Elecs. (AM)*, 157  
11 F.R.D. 477, 480 (C.D. Cal. 1993) ("If the detail sought by a motion for more definite statement  
12 is obtainable through discovery, the motion should be denied."). Therefore, Plaintiff's  
13 Amended Complaint complies with Fed. R. Civ. P. 8(a) and is not so vague or ambiguous that  
14 Defendant cannot reasonably prepare a response. Accordingly, Defendant's Motion for More  
15 Definite Statement is DENIED.

## 16 **B. Motion to Dismiss**

17 Defendant moves to dismiss Plaintiff's claims for negligence, gross negligence, express  
18 and implied warranty, strict product liability, and res ipsa loquitur. (*See generally* MTD & Mot.  
19 Definite Statement). The Court will first examine Plaintiff's claims for negligence and gross  
20 negligence.

### 21 **1. Negligence & Gross Negligence**

22 Defendant argues that Plaintiff's negligence claim fails because the Amended Complaint  
23 is devoid of information such as "dosage, duration, or frequency regarding [Plaintiff's]  
24 exposure to [Defendant's] gasoline and/or diesel fuel," as well as allegations permitting a  
25 reasonable inference that benzene exposure can cause Acute Myelogenous Leukemia. (MTD &

1 Mot. Definite Statement 6:27–7:1). In turn, Defendant posits that because Plaintiff’s  
2 negligence claim is insufficiently pled, Plaintiff’s gross negligence claim “must also fail  
3 [because] gross negligence requires demonstration of conduct far beyond failure to exercise  
4 ordinary care.” (*Id.* 7:4–8).

5 To state claim for negligence under Nevada law, a plaintiff must allege: (1) the existence  
6 of a duty of care; (2) breach of that duty; (3) legal causation; and (4) damages. *DeBoer v. Sr.*  
7 *Bridges of Sparks Fam. Hosp.*, 272 P.3d 727, 732 (Nev. 2012) (citations omitted). “A claim for  
8 gross negligence claim is separate from a normal negligence claim.” *Gaming v. Trustwave*  
9 *Holdings, Inc.*, No. 2:15-cv-02464, 2016 WL 5799300, at \*6 (D. Nev. Sept. 30, 2016). “[T]o  
10 state a claim for gross negligence a plaintiff must establish that the defendant failed ‘to exercise  
11 even the slightest degree of care’ in his conduct.” *Id.* (quoting *Hart v. Kline*, 116 P.2d 672,  
12 673–74 (Nev. 1941)); see *Smith v. Wolf Performance Ammunition*, No. 2:13-cv-2223, 2015 WL  
13 2359063, at \*3 (D. Nev. May 18, 2015) (“Gross negligence is a manifestly smaller amount of  
14 watchfulness and circumspection than the circumstances require of a prudent man.”)  
15 (quotation omitted).

16 Several district courts have considered Defendant’s argument that a plaintiff’s complaint  
17 alleging benzene exposure is deficient because it fails the precise timeframe of exposure.  
18 These district courts uniformly rejected this argument, reasoning that at the pleading stage, a  
19 plaintiff is not expected, nor in most cases able to, articulate a claim’s precise factual contours  
20 that may only later be elicited through discovery. See *Singleton v. Chevron USA, Inc.*, 835 F.  
21 Supp. 2d 144, 148 (E.D. La. 2011) (“The mere fact that Mr. Singleton does not yet point to a  
22 specific Valspar product and specific dates of exposure does not make the claim implausible  
23 under *Iqbal*.”); *Moore v. BASF Corp.*, No. 11-cv-1001, 2011 WL 5869597, at \*6 (E.D. La.  
24 Nov. 21, 2011) (“Plaintiffs’ failure to point to the specific products . . . , and to name the exact  
25 dates when and places where exposure to defendants’ products occurred does not make the



1 claim implausible at the pleading stage.”); *Martin v. Crown Equipment Corp.*, No. 1:13-cv-174,  
2 2013 WL 12063924, at \*2 (N.D. Ga. Apr. 15, 2013) (“Plaintiffs’ failure to allege the specific  
3 ‘brand’ of the product or the precise dates of Mr. Martin’s exposure does not make their claims  
4 implausible.”); *see also Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 982 (N.D. Cal. 2015)  
5 (“[T]he gaps in Plaintiffs’ ‘when’ allegations are not fatal to Plaintiffs’ Tobacco III claims.  
6 Instead, individual Plaintiffs’ exposure to Apple’s campaign can be tested after discovery  
7 permits further factual development.”).

8 Here, Plaintiff’s Amended Complaint alleges that Tyler Underwood was exposed to  
9 gasoline and diesel fuel containing benzene manufactured and sold by Defendant to the 7-  
10 Eleven gasoline station at 5700 Sun Valley Boulevard, Sun Valley, Nevada, and that this  
11 exposure to benzene caused him to contract fatal medical conditions, including Acute  
12 Myelogenous Leukemia. (Am. Compl. ¶ 6, 23, 24(u)). Plaintiff’s failure to allege the precise  
13 dates and extent of Tyler Underwood’s exposure does not make the claim implausible. *See*  
14 *Singleton*, 835 F. Supp. 2d at 148 (“Taken collectively, the allegations that Valspar  
15 manufactured certain classes of products, that these products contained benzene, that benzene  
16 causes myeloma, and that Valspar knew or should have known based on available industry  
17 research of the dangers of myeloma, taken collectively, allow the Court to ‘draw the reasonable  
18 inference that the defendant is liable for the misconduct alleged.’”) (citation omitted).

19 Nevertheless, the Court agrees with Defendant that Plaintiff must provide additional  
20 allegations regarding medical causation. Plaintiff’s Amended Complaint alleges that as the  
21 “direct and proximate result of his exposure to benzene, including concurrent exposure to  
22 benzene and other solvents in the benzene-containing solvent products, Tyler Underwood  
23 developed Acute Myelogenous Leukemia and multiple related adverse blood and marrow  
24 effects, cellular abnormalities, anemia, genotoxic effects and resultant DNA damage.” (Am.  
25 Compl. ¶ 22). While Plaintiff is correct that her Amended Complaint “need not be a medical



dissertation on leukemia causation,” (Resp. 7:20–22), her conclusory allegations fail the Fed. R. Civ. P. 8(a)(2) pleading requirement, which “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Plaintiff must include allegations which permit the reasonable inference that benzene exposure can cause the medical conditions Tyler Underwood was diagnosed with. Accordingly, the Court will dismiss Plaintiff’s negligence claim with leave to amend.<sup>3</sup>

## 2. Strict Product Liability

To bring a claim for strict product liability in Nevada, a plaintiff must “demonstrate that, the product at issue was defective, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff’s injury.”<sup>4</sup> *Ford Motor Co. v. Trejo*, 420 P.3d 649, 652 (Nev. 2017) (citation omitted). A plaintiff may bring a strict product liability claim on the theory of defect by failure to warn, defect by design, or defect by manufacturing. *Id.*

For the same reasons set forth above, Plaintiff’s Amended Complaint does not include sufficient allegations to demonstrate that the alleged defects in Defendant’s products caused Tyler Underwood’s injuries. Additionally, the Court notes that Plaintiff’s Amended Complaint alleges at length “the language that is [allegedly] omitted” from *Defendants’* products but neglects to “address the language that does appear” in *Defendant’s* products. *Kwasniewski v.*

---

<sup>3</sup> Plaintiff’s gross negligence claim, as an extension of her negligence claim, also requires legal causation. See *Martin v. Collier*, No. 2:11-cv-0320, 2011 WL 1628028, at \*2 (D. Nev. Apr. 28, 2011). Because the Court dismisses Plaintiff’s negligence claim, it will also dismiss Plaintiff’s gross negligence claim without prejudice and with leave to amend.

<sup>4</sup> As with Plaintiff’s negligence claim, Defendant repeats its argument that Plaintiff’s strict product liability claim fails for lack of causation. (MTD & Mot. Definite Statement 7:22–23, 8:8–10). However, “[t]he issue of causation is generally a factual issue to be determined by the trier of fact.” *Lwandowski v. Taser Int’l, Inc.*, No. 2:06-cv-0146, 2009 WL 10692836, at \*3 (D. Nev. Aug. 10, 2009) (citing *Frances v. Plaza Pacific Equities*, 847 P.2d 722, 724 (Nev. 1993)). Defendant may ultimately be correct that its products did not cause Tyler Underwood’s medical conditions. At this early stage in the litigation, however, Plaintiff’s Amended Complaint alleges sufficient facts to infer causation.

1 *Sanofi-Aventis U.S. LLC*, No. 2:12-cv-00515, 2018 WL 6566560, at \*3 (D. Nev. Nov. 1, 2008).  
 2 To determine whether a failure to warn claim is plausible and just hypothetically possible,  
 3 Plaintiff must allege the warning labels language that currently appears on Defendant's product,  
 4 and why this warning is deficient under the circumstances. If Plaintiff chooses to amend, the  
 5 Court advises her to include more particularized allegations as to each specific defendant to  
 6 demonstrate what each defendant allegedly did, or in this context, failed to do.

### 7 **3. Breach of Express & Implied Warranties**

8 To state a breach of warranty claim under Nevada law, a plaintiff must establish three  
 9 elements: (1) a warranty existed; (2) the defendant breached the warranty; and (3) the  
 10 defendant's breach was the proximate cause of the plaintiff's damages. *Nevada Contract Servs.,*  
 11 *Inc. v. Squirrel Cos. Inc.*, 68 P.3d 896, 899 (Nev. 2003). The Court first considers Plaintiff's  
 12 claim as to express warranties and then turns to the claim as to implied warranties.

#### 13 *a. Express Warranty*

14 "Express warranties may be created by an affirmation of fact that relates to the goods or  
 15 a description of the goods, where the information is made part of the basis of the bargain."  
 16 *Radcliff v. Amiraslanov*, 381 P.3d 653, 653 (Nev. 2012) (citing NRS § 104.2313). Express  
 17 warranties may also be created by a description of the goods, where the description is made part  
 18 of the basis of the bargain. NRS § 104.2313.

19 Defendant argues that Plaintiff's express warranty claim fails because the Amended  
 20 Complaint "fails to articulate specific facts or allegations that [Defendant] made any express or  
 21 implied statements regarding its gasoline and/or diesel fuel."<sup>5</sup> (MTD & Mot. Definite Statement  
 22 8:15–19). The Court agrees.

---

23  
 24 <sup>5</sup> Defendant additionally posits that Plaintiff's express and implied warranty should be dismissed because  
 25 depending on the year(s) Tyler Underwood was exposed, Plaintiff's express and implied warranty claims may be  
 barred by the respective six- and four-year statute of limitations. (MTD & Mot. Definite Statement 8:24–9:5).  
 The Court agrees with Defendant that Plaintiff's Amended Complaint fails to clearly allege Tyler Underwood's  
 precise dates of exposure to Defendant's products; the Court disagrees, however, that dismissal is appropriate on

1 Plaintiff's Amended Complaint alleges the following: "Defendant[] warranted, either  
2 expressly or impliedly, that their products were merchantable, safe and not unreasonably  
3 dangerous for use for the general public when in fact they were not . . . Defendant[] also made  
4 material misrepresentations, and/or omitted material information, relating to the benzene  
5 content and health hazards of their products." (Am. Compl. ¶ 55, 57). These generalized  
6 pleadings are insufficient to allege a violation of the express warranty.

7 Under Plaintiff's interpretation, an adequately pleaded express warranty claim would  
8 only require a plaintiff to summarily allege that a business warranted their product was safe  
9 when in fact, it was not. Even Plaintiff's allegation regarding the purported material  
10 misrepresentation of omitted material information does not identify with any degree of  
11 specificity what the misrepresented or omitted material information was. Instead, this  
12 allegation can be reduced to the following: Defendant said their product did not contain  
13 benzene when in fact, it did. The Court is unconvinced that this generalized representation is  
14 sufficient to allege an express warranty claim. *See Reed v. Arthrex, Inc.*, No. 3:17-cv-00337,  
15 2017 WL 4560140, at \*3 (D. Nev. Oct. 11, 2017) ("Here, the Reeds fail to allege any  
16 affirmation of fact or any description by Arthrex that relates to the plate. The claim for breach  
17 of an express warranty must therefore be denied."); *Hill v. Eli Lilly and Co.*, No. 3:20-cv-

---

18  
19 this basis. The possibility remains based on the timeline alleged by Plaintiff that these claims are not time-  
20 barred. Specifically, Plaintiff's Amended Complaint alleges that Tyler Underwood performed "mechanical 'side  
21 work' in various locations in Nevada and Arizona from 2010-2020." (Am. Compl. ¶ 16). "A claim may be  
22 dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitation only when the  
23 running of the statute is apparent on the face of the complaint." *Von Saher v. Norton Simon Museum of Art at  
Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010). Contrary to Defendant's position, it is equally true that Plaintiff's  
24 claims may not be time-barred. To be clear, the Court is not making an affirmative finding that these claims are  
25 timely. "Indeed, the dearth of factual detail in the [Amended Complaint] makes it impossible for the Court to  
assess the timeliness of the claim." *Pour v. Wells Fargo Bank*, No. 2:20-cv-02447, 2020 WL 12893826, at \*4 n.4  
(N.D. Cal. Dec. 1, 2020). At this point in the case, the Court is unable to conclusively determine that Plaintiff's  
claims are time-barred. The Court advises Plaintiff that "[a] party cannot avoid dismissal simply by omitting  
facts essential to [her] causes of action." *Id.* In deciding whether to amend, Plaintiff should be mindful of her  
pleading obligations under the Federal Rules.

00250, 2020 WL 4925688, at \*3 (D. Nev. Aug. 21, 2020) (dismissing the plaintiff’s express warranty claim where the plaintiff did not allege “that Eli Lily made an affirmation of fact related to the goods and does not allege that an express warranty was created by a description of the goods”).

Here, Plaintiff’s Amended Complaint contains no allegation of “any affirmation or promise made by [Defendant] that occurred prior to” Plaintiff’s purchase of its gasoline or diesel fuel that could have been a basis for the bargain. *R & O Const. Co. v. Rox Pro Inter. Group, Ltd.*, No. 2:09-cv-01749, 2011 WL 6400258, at \*3 (D. Nev. Dec. 20, 2011); *Flores v. Merck & Co., Inc.*, No. 3:21-cv-00166, 2022 WL 798374, at \*6 (D. Nev. Mar. 16, 2022) (“Flores fails to substantiate how Merck’s representations became part of the basis of the bargain—an element of breach of express warranty claims.”). “The claim of breach is possible but not plausible unless and until [Plaintiff] allege[s] the precise representation” made by Defendant so the Court can determine whether it made an affirmation of fact related to its products and if these affirmations were a “statement of fact or opinion.” *Greystone Nevada, LLC v. Anthem Highlands Community Ass’n*, No. 2:11-cv-01424, 2012 WL 2782603, at \*6 (D. Nev. July 9, 2012). Accordingly, the Court will dismiss Plaintiff’s express warranty claim without prejudice and with leave to amend.

*b. Implied Warranties*

The Court now considers Plaintiff’s implied warranty claims. Nevada law recognizes two types of implied warranties: (1) implied warranty of merchantability, and (2) implied warranty for fitness for a particular purpose. *Forest v. E.I. DuPont de Nemours & Co.*, 791 F. Supp. 1460, 1469 (D. Nev. 1992) (citing NRS §§ 104.2314–2315). Plaintiff does not specify which implied warranty theory she is proceeding under, so the Court will examine both.

Beginning with the latter, NRS § 104.2315 provides for an implied warranty for a particular purpose when: (1) the seller has reason to know of a particular purpose and (2) that

1 the buyer relies on the seller's skill or judgment to furnish a good that is fit for such a purpose.  
2 Here, Plaintiff's Amended Complaint fails to allege either of these essential elements. First,  
3 Plaintiff does not allege that Tyler Underwood utilized Defendant's products for a particular  
4 purpose, instead "his use was ordinary." *Miller v. DePuy Synthes Sales, Inc.*, No. 3:17-cv-  
5 00325, 2019 WL 4016207, at \*6 (D. Nev. Aug. 26, 2019). Second, Plaintiff does not allege  
6 how Tyler Underwood relied on Defendant's judgments in determining how to use Defendant's  
7 products. Accordingly, Plaintiff's Amended Complaint fails to allege a claim under the implied  
8 warranty for fitness for a particular purpose.

9 Turning to the implied warranty of merchantability claim, for goods to be merchantable,  
10 they must be "fit for the ordinary purpose for which the goods are used." NRS § 104.2314. The  
11 implied warranty of merchantability is breached "when the goods manifest a defect which  
12 renders them unfit for the ordinary purpose for which they are used." *Holmes v. Merck & Co.*,  
13 No. 2:04-cv-00608, 2008 WL 11348410, at \*3 (D. Nev. June 16, 2008) (citation omitted).

14 While the Court assumes Tyler Underwood was using Defendant's products as intended,  
15 the issue here is that Plaintiff has not alleged the products manifested a defect which rendered  
16 them unfit for the ordinary purpose they are used. Put differently, Plaintiff does not allege  
17 that the subject gasoline and diesel fuel "was not fit for the ordinary purpose for which it was  
18 sold-*i.e.*, operating motor vehicles and other combustion engines." *Lundy v. Conoco Inc.*, No.  
19 3:05-cv-477, 2006 WL 3300397, at \*3 (S.D. Miss. Nov. 10, 2006) (dismissing the plaintiff's  
20 implied warranty of merchantability claim where the plaintiff alleged she developed Acute  
21 Promyelocytic Leukemia as a result of her exposure to gasoline and other benzene-containing  
22 products); *see McCracken v. Exxon/Mobil Co.*, No. 08-cv-2932, 2009 WL 3822041, at \*5 (E.D.  
23 Pa. Nov. 12, 2009) ("Plaintiff does not allege that the gasoline failed to operate normally, that,  
24 is, failed to power his vehicles."). Thus, Plaintiff has not alleged that the subject products did  
25 not do what it was supposed to do, and therefore, has failed to state a claim for breach of

1 implied warranty. *See Holmes*, 2008 WL 11348410, at \*3 (“Here, there is no factual dispute  
 2 that the ‘ordinary purpose’ of the MMR vaccine is to immunize against disease.”); *Peri & Sons*  
 3 *Farms, Inc. v. Jain Irr., Inc.*, No. 3:11-cv-0757, 2012 WL 5198502, at \*3 (D. Nev. Oct. 19,  
 4 2012) (“It is undisputed that the drip tape failed to deliver water to Peri & Son’s onion crop,  
 5 which rendered it unfit for its intended purpose—irrigation.”). Accordingly, Plaintiff’s implied  
 6 warranty of merchantability claim is dismissed without prejudice and with leave to amend.

#### 7 **4. Res Ipsa Loquitur**

8 “Res ipsa loquitur is an exception to the general negligence rule” that “a mere happening  
 9 of an accident or injury will not give rise to the presumption of negligence.” *Pate v. Wal-Mart*  
 10 *Stores, Inc.*, No. 2:12-cv-1377, 2014 WL 3613385, at \*5 (D. Nev. July 21, 2014) (citing  
 11 *Woosley v. State Farm Ins. Co.*, 18 P.3d 317, 321 (Nev. 2001). The doctrine allows a party “to  
 12 infer negligence” when (1) the event is of a kind that “ordinarily does not occur in the absence  
 13 of someone’s negligence,” (2) it is “caused by an agency or instrumentality within the exclusive  
 14 control of the defendant, and (3) it was “not due to any voluntary action or contribution of the  
 15 plaintiff.” *Id.* at \*5 (citing *Woosley*, 18 P.3d at 321).

16 Plaintiff acknowledges that this Court has previously dismissed with prejudice  
 17 independent claims for res ipsa loquitur because it is a “theory of liability or a method of  
 18 establishing liability for negligence; it is not a separate cause of action.” (Resp. 11:7–11)  
 19 (quoting *Zander v. Tropicana Entm’t, Inc.*, No. 2:13-cv-00848, 2014 WL 794212, at \*2 (D.  
 20 Nev. Feb. 26, 2014); see *Piccinni v. United States*, No. 3:17-cv-00584, 2018 WL 2014068, at  
 21 \*2 (D. Nev. Apr. 30, 2018) (dismissing the plaintiffs standalone res ipsa loquitur claim because  
 22 “the res ipsa loquitur doctrine is ‘merely a rule of evidence, not a substantive rule of law’”)  
 23 (quotation omitted); *Hansen v. Albertson’s Cos., LLC*, No. 2:19-cv-02050, 2020 WL 8261604,  
 24 at \*1 n.1 (D. Nev. Dec. 14, 2020) (“Hansen’s complaint also includes ‘claims’ for punitive  
 25 damages and res ipsa loquitur, which are not claims, but a remedy and theory of negligence,

1 respectively.”) (citing 65A C.J.S. *Negligence* § 808 (2020) (“[T]he doctrine of res ipsa loquitur  
2 is not a independent cause of action or an independent legal claim. [It] describes not a  
3 substantive claim but a manner of proceeding on that claim.”). Nevertheless, Plaintiff  
4 maintains that the Court should refrain from dismissing her standalone res ipsa loquitur claim  
5 based on this court’s decision in *Ingram v. Walgreen Co.*, No. 2:10-cv-01813, 2011 WL  
6 1661505, at \*2–3 (D. Nev. May 3, 2011). (Resp. 11:12–19). In *Ingram*, the court declined to  
7 dismiss the plaintiff’s res ipsa loquitur claim because it was “not redundant, immaterial, or  
8 impertinent.” *Id.* at \*3.

9         The Court considers the reasoning set forth in *Ingram* but does not find it persuasive.  
10       The weight of authority in this District has found that res ipsa loquitur is a theory of liability or  
11       a method of establishing liability for negligence and not a separate cause of action. Plaintiff  
12       has not presented sufficient reasons for the Court to deviate from this conclusion. Accordingly,  
13       Plaintiff’s standalone res ipsa loquitur claim is DISMISSED with prejudice.

14       In sum, Defendant’s Motion for More Definite Statement is DENIED. Defendant’s  
15       Motion to Dismiss is GRANTED. Plaintiff’s claims for negligence, gross negligence, strict  
16       product liability, and breach of express and implied warranty are dismissed without prejudice  
17       and with leave to amend because it is not clear that amendment is futile. *See Hoang v. Bank of*  
18       *Am., N.A.*, 910 F.3d 1096, 1102–03 (9th Cir. 2018) (“Leave to amend can and should generally  
19       be given, even in the absence of such a request by the party,” so long as amendment would not  
20       be futile”). Plaintiff’s standalone claim for res ipsa loquitur is dismissed with prejudice  
21       because amendment is futile.

22 ///

23 ///

24 ///

25 ///



1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Defendant's Motion for More Definite Statement,  
3 (ECF No. 258), is **DENIED** and Motion for Dismiss, (ECF No. 258) is **GRANTED**.

4 Plaintiff shall have twenty-one (21) days of the date of this Order to file an amended  
5 complaint. Any amended complaint should remedy the deficiencies identified in this Order.  
6 Failure to file an amended complaint by this date shall result in the Court dismissing this action  
7 with prejudice.

8  
9 **DATED** this 1 day of May, 2023.

10  
11   
12 \_\_\_\_\_  
13 Gloria M. Navarro, District Judge  
14 UNITED STATES DISTRICT COURT  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25